

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA,

v.

LEWIS WHOOLERY,

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Criminal No. 10-144-02
(Civil No. 15-1168)

MEMORANDUM OPINION

Conti, Chief District Judge.

Now pending are defendant Lewis Whoolery's pro se motion for reconsideration of the court's opinion and order of January 18, 2017 (ECF No. 431), and his motion "requesting decision on my COA." (ECF No. 433).¹ A response from the government is not necessary. The motions will be denied.

Factual and Procedural Background

The procedural history of this case is tortuous and will not be repeated in full. As relevant to the pending motions, Whoolery was convicted of wire fraud conspiracy in January 2013, after an eight-day trial in this court, and was sentenced to serve a 120-month sentence of incarceration and to pay almost \$2 million in restitution. (ECF Nos. 152, 282.) Whoolery filed a direct appeal and his conviction and sentence were affirmed. (ECF No. 332).

Whoolery filed a § 2255 motion, which this court denied. (ECF Nos. 410, 411). Whoolery again appealed.² While his appeal was pending at the court of appeals, Whoolery filed

¹ Whoolery's attempt to impose a five-day deadline for this court to issue a decision is improper and meritless.

² Whoolery also appealed the denial of various motions related to the § 2255 motion. (ECF Nos. 410-11, 413-18.) The appeals were docketed at Docket Numbers 16-3243 and 16-3483 in the court of appeals, and were consolidated

several additional motions in this court. On January 18, 2017, the court issued an opinion and order which denied Whoolery's Rule 60(b) motion to vacate judgment (ECF No. 420), his motion for bond (ECF No. 421), and his motion for appointment of counsel (ECF No. 427), for lack of subject-matter jurisdiction due to the pendency of his appeal, and denied his motion for an indicative ruling (ECF No. 419), commenting that it did not raise a substantial issue warranting remand from the Court of Appeals for the Third Circuit. (ECF Nos. 429, 430). Whoolery now seeks reconsideration of the court's decision.

On February 13, 2017, the United States Court of Appeals for the Third Circuit issued an order denying Whoolery's appeal. The court of appeals refused Whoolery's request for a certificate of appealability and explained that he had failed to make a substantial showing of prejudice with respect to his ineffective assistance of counsel, prosecutorial misconduct, or Brady v. Maryland claims. (ECF No. 432). The court of appeals commented that "the motion and files and records of the case show conclusively that the movant is not entitled to relief." *Id.*³

Legal Analysis

A motion for reconsideration should be granted only where the moving party establishes one of the following grounds: "(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court [issued its order]; or (3) the need to correct a clear error of law or fact to prevent manifest injustice." *Telfair v. Lynch*, No. CV 16-5085 (SDW), 2016 WL 7015628, at *4 (D.N.J. Dec. 1, 2016). Whoolery made no such showing. The only material development in this case, the decision of the court of appeals, confirms that Whoolery's arguments are without merit and that he is not entitled to a certificate

by order dated September 19, 2016.

³ The court notes that Whoolery has filed a petition for rehearing en banc by the court of appeals. (Case No. 16-3243).

of appealability.

The court of appeals has explained that “when reviewing a Rule 60(b) motion brought following an appeal, district courts are ‘without jurisdiction to alter the mandate of this court on the basis of matters included or includable in [the party's] prior appeal.’ ” *Bernheim v. Jacobs*, 144 Fed.Appx. 218, 222 (3d Cir. 2005) (*quoting Seese v. Volkswagenwerk, A.G.*, 679 F.2d 336 (3d Cir. 1982)). “This rule applies to Rule 60(b) motions brought by an unsuccessful habeas petitioner after the conclusion of his appeal.” *Garcia v. Bartkowski*, No. CV 11-3689(MCA), 2016 WL 7013460, at *6 (D.N.J. Nov. 30, 2016) (*citing McCollister v. Cameron*, No. CIV.A. 11-0525, 2014 WL 4055821, at *3 (E.D. Pa. Aug. 14, 2014) (finding no jurisdiction to consider Rule 60(b) motion where the court of appeals had considered the issues raised by petitioner in denying appeal)); *see also Williams v. Patrick*, No. CIV.A. 07-776, 2014 WL 2452049, at *3 (E.D. Pa. June 2, 2014) (a motion based on matters that were before the court of appeals may not be reviewed subsequently by the district court).

The February 13, 2017 order by the court of appeals deprives this court of jurisdiction to consider Whoolery’s instant arguments because those arguments were included or includable in his appeal. In the pending motions, Whoolery reiterates his contentions regarding Brady v. Maryland and alleged prosecutorial misconduct and seeks a certificate of appealability. The court of appeals specifically denied Whoolery’s request for a certificate of appealability and stated that he failed to make a substantial showing of prejudice with respect to his ineffective assistance of counsel, prosecutorial misconduct, or Brady v. Maryland claims. (ECF No. 432). The court adheres to its conclusions in the January 18, 2017 opinion and order that it lacks jurisdiction over Whoolery’s motions and that he failed to raise any substantial issue which would warrant relief.

Conclusion

For the foregoing reasons, Whoolery's motion for reconsideration of the court's opinion and order of January 18, 2017 (ECF No. 431) and his motion "requesting decision on my COA" (ECF No. 433) will be DENIED. A certificate of appealability shall not issue. An appropriate order will be entered contemporaneously with this opinion.

February 24, 2017

BY THE COURT:

/s/ Joy Flowers Conti

Joy Flowers Conti

Chief United States District Judge

**IN THE UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA,

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LEWIS WHOOLERY,

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Criminal No. 10-144-02
(Civil No. 15-1168)

ORDER

AND NOW, this 24th day of February, 2017, for the reasons set forth in the accompanying opinion, IT IS HEREBY ORDERED that Lewis Whoolery's motion for reconsideration of the court's opinion and order of January 18, 2017 (ECF No. 431) and his motion "requesting decision on my COA" (ECF No. 433) are DENIED. A certificate of appealability shall not issue.

BY THE COURT:

/s/ Joy Flowers Conti
Joy Flowers Conti
Chief United States District Judge

cc: Lewis Whoolery, 34634-068
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